SUPREME COURT, U. S.

FILE

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MICHAEL RODAK, JR.

No. 74-475

In the Supreme Court of the United States

OCTOBER TERM, 1974.

UNIVERSAL BUILDERS, INC., et al,

Petitioners,

vs.

SIDNEY AND JULIA CLARK, et al,

Respondents.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners (defendants below) are seeking review of two interlocutory opinions of the United States Court of Appeals for the Seventh Circuit. At 501 F.2d 324, the Seventh Circuit unanimously reversed a verdict directed against respondents at the close of their case and remanded for a new trial. At 420 F.2d 1191, the Seventh Circuit unanimously affirmed certain statute of limitations rulings by the district court; this Court previously declined to review the statute of limitations decision (400 U.S. 821). Both opinions are printed in the Appendix to the petition.

QUESTIONS PRESENTED

The petition raises the following questions:

1. Does a seller of residential housing violate the Civil Rights Act of 1866 (42 U.S.C. §1982) if he charges black citizens prices which are unreasonably in excess of prices charged white citizens for comparable housing?

2. Is an officer of a corporation liable for his own violations of 42 U.S.C. §1982, as well as the corporation which he owns and operates?

3. If a violator of a black citizen's civil rights reaps a benefit from continuing enforcement of an unlawful scheme, is the statutory limitations period tolled during the continuing unlawful action?

4. May petitioners avoid liability for their violations of 42 U.S.C. §1982 on the ground that the decision below should not be applied retroactively?

STATEMENT OF THE CASE

The Seventh Circuit's opinion (501 F.2d 324, reprinted at Petition A. 1-29) contains a comprehensive summary of the evidence which was adduced during the six week trial. We shall briefly summarize respondents' case and correct misstatements made by petitioners.

Respondents are a class of over 1,000 black families who bought new residential housing on the southside of Chicago from petitioners during the period 1958-68. Respondents alleged, and proved *prima facie*, that: (1) due to rigid racial segregation, a dual housing market exists in Chicago, one for whites and one for blacks; (2) the supply of housing in the black market, as compared to the white market, is scarce relative to the demand; (3) petitioners took advantage of this market situation by

charging respondents prices unreasonably in excess of prices charged white persons for comparable housing and on terms more onerous than the terms to which whites were subject; (4) one of the petitioners and corporations which were closely related to the other petitioners by virtue of substantially common ownership and management sold new houses of comparable value to whites at lower prices than the prices which petitioners charged respondents.

Petitioners assert that they were willing to charge the same excessive prices to whites as they charged respondents. This assertion is specious since whites were not subject to the same infirmities of discrimination as respondents. Thus, whites, who were not forced to pay excessive prices for housing, did not purchase housing from petitioners on the southside of Chicago.

Respondents' evidence showed that one of the petitioners and corporations owned and managed by substantially the same persons* as the other petitioners sold homes exclusively to whites in Deerfield, Illinois, an all-white Chicago suburb. Although many of the homes purchased by respondents were of comparable value, the prices charged respondents were far in excess of the prices charged the white purchasers. The same was true of the prices of P.F.S. Development Co. (P.F.S.), which also operated in a predominately white suburb of Chicago. The president and owner of one of the petitioners was the first president and an owner of P.F.S. and set the prices of houses sold by P.F.S.

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* All of the officers, directors and shareholders of these petitioners and the related corporations were very close blood relatives. The managing officers were always the same persons.

Respondents' evidence showed that, absolutely and relative to direct costs and sales price, petitioners' gross and net profit per home exceeded by approximately 80% to 100% the gross and net profit earned in the Deerfield operation. Although there is no evidence in the record concerning the net profit of P.F.S., petitioners' gross profit per home exceeded P.F.S.' gross profit per home by about 100%.*

Richard Freeman, an economist who analyzed respondents' evidence on comparative prices and profits, testified: "I reached the conclusion that, in fact, the prices paid by plaintiffs in this case were in part, in large part, determined by their race." He concluded that the differences between the prices charged respondents and the lower prices charged whites in Deerfield were due to the race of the buyers (Petition A.23 and n.21).

In sum, petitioners' assertion that they "had treated all with equality" is false. This assertion depends on the untenable proposition that the same individuals can evade section 1982 by the simple procedure of setting up different

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* The net profit assertions in the first full sentence of page 6 of the petition are not supported by the record. The evidence in the record shows that petitioners' net profit per home far exceeded the net profit per home on sales to whites, both absolutely and relative to direct cost and sales price. Since all of these corporations were closely held, corporate net profit figures were subject to manipulation. Respondents showed that petitioners paid out large sums of money to the members of the shareholder families in order to create deductions and minimize the impact of the double taxation of corporate earnings and dividends. The Seventh Circuit recognized this problem by concentrating on the evidence of gross profits (Petition A. 21-23).

corporations with common ownership and management to deal with whites and with blacks.

The trial judge, the Honorable Joseph Sam Perry, stated that, while petitioners had exploited respondents for profit, they had not discriminated. He ruled that, even if blacks were charged higher prices than whites for comparable housing, section 1982 was not violated because these comparable white sales were not made by petitioners. He excluded all evidence of the suburban sales to whites by petitioners and their related corporations (Petition A.3. 19-23).

The Seventh Circuit, after a thorough review of the 5,460 page trial transcript and numerous documentary exhibits, reversed the trial judge's rulings on these issues. It also reversed several other rulings of the trial judge, to include rulings which were intended to frustrate appellate review (see Petition A.27-28).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Seventh Circuit's Decision, Which Petitioners Have Misrepresented, Does Not Conflict With Jones v. Mayer, 392 U.S. 409 (1968).

Petitioners have completely misrepresented the holding of the Seventh Circuit. It did *not* hold that blacks state a cause of action if they merely allege that the prices charged them for housing were "unreasonable." Rather, it held (Petition A.14):

> "We hold accordingly that plaintiffs state a claim under section 1982 since they allege that (1) as a result of racial residential segregation dual housing markets exist and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white persons for comparable housing. If the plaintiffs sustain the burden of proof on these elements they make out a *prima facie* case, whereupon, as recently made clear by the Supreme Court, the burden of proof shifts to the defendants 'to articulate some legitimate, nondiscriminatory reason' for the price and term differential. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)."

After its review of the voluminous record, the Seventh Circuit held that, as a *prima facie* matter, respondents proved that the prices which petitioners demanded were unreasonably in excess of the prices available to white persons for comparable property.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 420 (1968), this Court stated that "In plain and unambiguous terms, §1982 grants to all citizens, without regard to race or color, 'the same right' to purchase and lease property 'as is enjoyed by white citizens.' " Also, this Court warned that the promises set forth in the Thirteenth Amendment would constitute "... 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." 392 U.S. at 443.

Since respondents paid more than whites for comparable housing, they did not have the "same" right as whites to buy housing and their housing dollars were worth less than white citizens' dollars. This is true even if petitioners had never sold to whites and even if respondents had relied solely on evidence of sales by others to whites to prove that the prices demanded by petitioners were unreasonably in excess of prices available to white persons for comparable housing.

The Seventh Circuit's decision does not conflict with the clear language of section 1982 or with this Court's decision in *Jones* v. *Mayer*.

II.

Consideration Of Whether To Review This Case Should Await Full Development Of The Record.

The Seventh Circuit's decision on the issue of discrimination rests on two separate grounds. The Seventh Circuit held that, irrespective of whether petitioners sold to whites, they violated section 1982 since the prices which they demanded were unreasonably in excess of the prices available to whites (Petition A.4-15). Petitioners call this a "novel" construction of section 1982 (Petition 16). Also,

it held that respondents had proved more favorable sales to whites by petitioners and related corporations, evidence of which was erroneously excluded by the trial judge (Petition A.19-24).

The second ground of the Seventh Circuit's decision merely involves rulings on evidentiary questions after a review of the trial record. These evidentiary rulings are not substantial enough to warrant review by this Court.

As shown above, the first ground of the Seventh Circuit's decision is not novel, but rather is based on the clear language of section 1982 and this Court's decision in *Jones v. Mayer*. In any event, since retrial of the case is called for on the factual issues of discrimination raised by the second ground of the Seventh Circuit's opinion, the petition should be denied. On retrial, petitioners will have the opportunity to rebut the evidence with respect to both of these claims of racial discrimination.

III.

Since Individuals, As Well As Corporations, Are Liable For Their Own Civil Rights Violations, The Seventh Circuit's Decision That Respondents Should Be Permitted To Add As Defendants The Managing Officers Of Petitioners Does Not Conflict With The Decision Of Any Federal Court.

A month before the trial was scheduled to begin, and four months before it actually began,* respondents moved for leave to add as defendants petitioners' managing officers who were also shareholders and directors. Respondents claimed that petitioners were mere corporate shells through which the officers conducted their discriminatory schemes

* Postponements requested by both sides accounted for this delay.

to reap illegal profits. The trial judge denied this motion solely on the ground that adding new parties would delay the trial. The Seventh Circuit reversed that ruling (Petition A.24-25).

No substantial question is raised by the ruling that respondents should have been granted leave to amend. Contrary to petitioners' assertions, it is no more "unique" that a corporate officer is liable for his own civil rights violations, than it is unique that a servant is liable for his own torts. See *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) (individuals liable for violations of 42 U.S.C. §1985 (3)).

There is no conflict with *Spears* v. *Transcontinental Bus System*, 226 F.2d 94 (9th Cir. 1955). In *Spears*, the court held that ownership, without more, did not render a parent corporation liable for the civil rights violations of its subsidiary corporation. That is wholly different than holding officers, who are also shareholders,* answerable for their own illegal conduct.

IV.

The Statute Of Limitations Question Is Not In Conflict With Any Decision Of This Court Or The Courts Of Other Circuits.

Respondents alleged, and proved *prima facie*, that petitioners' insistence on the installment contract form of sale was an essential part of their discriminatory selling

* Not all of the shareholders were added as defendants. Only those who actively managed the closely-held corporate defendants were added.

methods.* In a decision which this Court previously declined to review (400 U.S. 821), the Seventh Circuit held that the applicable five-year statute of limitations period did not commence to run until the contracts terminated because the contracts involved continuing enforcement of an unlawful scheme (420 F.2d 1191, 1200, reprinted at Petition A.44-45).

This decision, which merely affects the size of the class in this case, is not inconsistent with the decision in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), or any of the circuit court opinions cited by petitioners. In *Zenith*, this Court held that the limitations period for a private anti-trust action is tolled by a government action and does not bar recovery of damages for pre-limitations conduct which were speculative at the time the conduct occurred. Clearly, the *Zenith* decision does not conflict with the decision below.

V.

The Question Of Retroactive Application Of The Lower Courts' Construction of 42 U.S.C. § 1982, Not Heretofore Raised By Petitioners, Does Not Warrant Review.

Although the interpretation of section 1982 which petitioners call "novel" was first pronounced about three years

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* Mortgage money was unavailable due to the exorbitant prices demanded by petitioners, thereby requiring them to employ the contract sales method. The contracts did not specify the contract term. Respondents' amortization calculations showed that many had terms as long as from 35 to over 46 years. The contracts contained onerous provisions to which a mortgagor is not subject (Petition 17-19 nn.12-14).

prior to trial,* petitioners have waited until now to raise the issue of retroactive application of that interpretation. Petitioners' untimely attempt to raise this question should be rejected.

Furthermore, the question is insubstantial. The Seventh Circuit followed the decision in *Jones* v. *Mayer* in which this Court put new life into section 1982 after it had lain dormant for a century. In *Waters* v. *Wisconsin Steel Works of Internat'l. Harvester Co.*, 427 F.2d 476, 484 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970), the Seventh Circuit rejected an argument that *Jones* v. *Mayer* should not be applied retroactively:

> "Finally, defendants maintain that the Jones case should not be given retroactive application. This argument is sufficiently answered by the fact that the Supreme Court has already applied the Jones case retroactively in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969)."

The same answer applies here.

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* Judge Hubert L. Will originally presided over this case and denied petitioners' motion to dismiss. *Contract Buyers League* v. *F & F Investment*, 300 F.Supp. 210, 214-16 (N.D. Ill. 1969), previously consolidated with the instant case. The trial judge implicitly overruled Judge Will whose opinion on the scope of section 1982 and the meaning of *Jones* v. *Mayer* was, in effect, affirmed by the Seventh Circuit (Petition A. 11 and n.7).

CONCLUSION

The petition should be denied.

Respectively submitted,

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